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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 446

PEOPLE OF THE STATE OF ILLINOIS

Respondent,

and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER, E. V. KEISLING and OMAR SENIFF,

Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HEISER, VIRGIL L. JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON and JULIUS C. BRISTOW,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

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Respondents respectfully pray that the Petition for Writ of Certiorari filed in this cause be denied.

STATEMENT OF THE CASE

The objective of the Petitioners as shown by the record in this case is to have declared invalid the organization of a community unit school district whose territory comprises approximately 385 square miles situated within five contiguous counties in the State of Illinois. The organization of the district became effective on November 15, 1966 (Rec. Vol. II Exhibit F) and said school district was declared established and was named Community Unit School District No. 16, in McLean, Woodford, DeWitt, Logan and Tazewell Counties, Illinois, on November 21, 1966 (Rec. Vol. II Exhibit G).

On December 22, 1967, the State's Attorney of McLean County, Illinois, commenced a quo warranto proceeding in the name of the People of the State of Illinois to contest the organization of the school district (Rec. Vol. I, pp. C7-8) against the Respondents herein who are the members of the Board of Education of said school district.

Upon trial of the cause, the court, by decree entered January 8, 1968, found the district to be valid and the Respondents not guilty of unlawful usurpation of the powers of the board of education (Rec. Vol. I, pp. C36-48). Under Illinois law such a decree is not subject to appeal after 30 days from the entry thereof (Ill. Rev. Stat. Ch. 110, Sec. 72) absent an appropriate post trial motion.

The State's Attorney filed a Motion to Vacate on February 6, 1968 (Rec. Vol. I, pp. C49-53).

On February 21, 1968, the law firm of Swain, Johnson & Gard as attorneys for persons undisclosed filed their motion to be made additional counsel for the People of the State of Illinois. The trial court took both motions

under advisement and exhaustive briefs were filed relative thereto (Rec. Vol. I, pp. C57-141).

On April 9, 1968, Petitioners by their attorneys, Swain, Johnson & Gard, filed their Petition for Leave to Intervene (Rec. Vol. I, pp. C144-155) for the purpose of filing a motion to vacate the decree of the trial court entered January 8, 1968. April 9, 1968, was the first time Petitioners made their appearance in the proceeding. On April 15, 1968, the trial court denied the motion of Swain, Johnson & Gard to enter as additional counsel for the People as not authorized by statute (Rec. Vol. I, pp. C160-161), and on May 1, 1968, the court denied Petitioners' Petition for Leave to Intervene.

On May 6, 1968, the court denied the State's Attorney's motion of the People to vacate the quo warranto decree.

Thereafter, Petitioners appealed the order of the trial court denying their Petition for Leave to Intervene. As set forth in Petitioners' Petition for Writ of Certiorari, both the Appellate Court of Illinois, Fourth District, and the Supreme Court of Illinois affirmed the trial court (Pet. for Writ of Cert., Appendix A, pp. A-1-A-10; Appendix D, pp. A-14-A-18).

REASONS FOR DENYING THE WRIT

1. The trial court, in confirming the validity of the organization of the school district and denying the People's motion to vacate the decree, based upon the evidence in the case (Rec. Vol. III, pp. 1-108), found, inter alia, that the granting of the relief prayed in the quo warranto proceeding would result in great detriment to the public and that the People were guilty of laches (see Order Denying Petition to Vacate Decree, Rec. Vol. I, pp. 208-211).

2. Contrary to the assertions of Petitioners in their Petition (par. 1, p. 10), the long established application in Illinois of the doctrine of laches is not necessarily bottomed on the lapse of a particular period of time.

". . . What caused the action to be barred was neither the lapse of time nor the acquiescence of the plaintiffs, but, rather, the fact that during the period of delay and acquiescence certain action had been taken by the district and certain conditions had developed whereby great inconvenience and public detriment would result from a judgment of ouster . . . The basis for the decision was that the granting of the relief prayed for would be manifestly against the public interest, and the doctrine of laches was invoked for that reason.", *The People ex rel. Jordan v. Forest View*, 21 Ill. 2d 384, 390, 172 N.E. 2d 780, 784, (1961) (cited also by the Illinois Appellate Court in the case at bar, Pet. for Writ of Cert., Appendix A, pp. A-7-A-8); *The People ex rel. Zimmerman v. Jones*, 308 Ill. 246, 249, 139 N.E. 403 (1923) (cited also by the Illinois Supreme Court in the companion case to the case at bar, Pet. for Writ of Cert., Appendix D, p. A-17).

Further, even in terms of computation of time, Petitioners are in error. The People delayed for some eleven months in raising objections to the organization of the district, not six months as Petitioners claim (Pet. for Writ of Cert., p. 10, Appendix A, p. A-9). The Petitioners delayed well over a year.

An examination of these Illinois cases indicates no departure from long established principles applicable to the doctrine of laches.

3. Contrary to the assertions of Petitioners in their Petition (par. 2, pp. 10, 11), the Illinois Appellate and

Supreme Courts in denying Petitioners relief did not ignore the mandate of Illinois Supreme Court Rule 301 (Ill. Rev. Stat., Ch. 110A, Sec. 301) to the effect that "every final judgment of a circuit court in a civil case is appealable as of right . . .". In fact, it is the Petitioners who ignored and failed to use their clear right of appeal.

The quo warranto decree was entered January 8, 1968, and it did not become final and unappealable until the expiration of 30 days therefrom. Petitioners engaged Swain, Johnson & Gard as their attorneys on January 23, 1968, (Rec. Vol. I, p. C144, par. 3). There is no question but that Petitioners were fully aware of the entering of the quo warranto decree on January 8. They had until February 7, 1968 to avail themselves of the provisions of the Illinois Civil Practice Act to file a notice of appeal to perfect their own right of appeal as non-parties claiming to be aggrieved by the result of the decree since Illinois Supreme Court Rule 301 also provides "all rights that could have been asserted by appeal or writ of error may be asserted by appeal". The writ of error was historically in Illinois the method of appeal by a non-party (see Ill. Rev. Stat., Ch. 110, Sec. 74, repealed and now embodied in Illinois Supreme Court Rule 301. Repealed Section 74 reads in part "the right heretofore possessed by any person not a party to the record to review a judgment or decree by writ of error is preserved by notice of appeal."). Illinois Supreme Court Rule 301 also provides "The appeal is initiated by the filing of a notice of appeal. No other step is jurisdictional". Illinois Supreme Court Rule 303 (Ill. Rev. Stat., Ch. 110A, Sec. 303) provides "The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from".

Thus it is clear that the Petitioners had an independent, clear, and efficient remedy by way of a right of appeal which they either ignored or chose not to use. They failed to file a notice of appeal and pursue their remedy. When Petitioners sought to intervene in the proceeding, the quo warranto decree of January 8, 1968, had long since been final and unappealable as to the Petitioners under Illinois law.

Further, in paragraph 2 of their Petition for Writ of Certiorari, Petitioners assert that the Illinois Appellate and Supreme Courts affirmed the trial court following only oral argument on a motion which merely raised the question of Petitioners' right to appeal. This is simply not the fact. As stated in the Appellate Court opinion (Pet. for Writ of Cert., Appendix A, p. A-3) and as shown by the record, the Petitioners limited their appeal to the trial court's order denying them leave to intervene. This was the issue before the Appellate Court. The Court found that the Petitioners had not established a right to intervene and the trial court did not abuse its discretion in denying them leave to intervene under the particular facts of this case, the Petitioners being held guilty of laches in asserting their rights.

4. Petitioners in paragraph 3 of their Petition for Writ of Certiorari (p. 11) contend they were improperly denied the right to intervene to appeal and argue the merits of the quo warranto proceeding. Aside from the fact that the Petitioners failed to utilize their clear right of appeal as non-parties, it should be pointed out that throughout the contest with Petitioners the Respondents placed squarely before the trial court (Rec. Vol. I, pp. C163-164) and before the Appellate Court (Appellees' Motion to Dismiss Appeal, par. 5), inter alia, the fact that Petitioners were guilty of laches and that the alleged

rights of the Petitioners sought to be asserted by them are no greater than the right of the public generally with respect to which the trial court found to be best served by confirming the school district and denying ouster of the Board, any other result causing great harm to the public.

The essentials of the entire record in the quo warranto proceeding were before both the Illinois Appellate and Supreme Courts as it is established that the exercise of discretion on a motion to intervene is not reviewable unless clear abuse of discretion is shown, and it is not ordinarily possible to determine that question except in light of the whole record, *Allen Calculators v. National Cash Register Company*, 64 S. Ct. 905, 908, 322 U.S. 137, 88 L.ed. 1188. Further, Petitioners' brief on appeal presented not only their position on intervention, but also in general their position on the merits of the quo warranto proceeding (Brief for Petitioners-Appellants, pp. 17, 18, 19, 20), notwithstanding the fact that they limited their appeal to the denial of intervention by the trial court.

In connection with this entire proceeding, it is also important to note that the Petitioners squarely stated to the trial court that they were satisfied with the handling of this case by the State's Attorney at the trial level, that their problem was simply that the State's Attorney was not going to appeal and that the 30 day time period with respect to the quo warranto decree had elapsed (Rec. Vol. III, p. 226, Pet. for Writ of Cert., Appendix A, p. A-9). From this it can be properly concluded that the Petitioners had no additional or further evidence to offer in the case.

The Illinois trial, Appellate and Supreme Courts correctly found that Petitioners had not established their right to intervene in this case.

5. Petitioners claim that they had an agreement with the State's Attorney that an adverse decision in the trial court would be appealed. The Illinois Appellate Court properly disposed of that issue in its opinion (Pet. for Writ of Cert., Appendix A, pp. A-2-A-10). Further, it should be noted that there is absolutely no evidence of any kind in the record in this case substantiating such claim of Petitioners. Respondents have no knowledge of such alleged agreement and were not present at any time such alleged agreement was purportedly made. The only reference appears in the pleadings filed by Petitioners. "Errors assigned . . . must be based upon the record itself. They cannot rest upon mere agreement of counsel or on the fact that the question might be raised in the pleadings . . .", *People ex rel. Toman v. Belmont Radio Corporation*, 388 Ill. 11, 20, 57 N.E. 2d 479.

6. Petitioners claim the Illinois Appellate and Supreme Courts invoked new, novel procedural requirements and thereby foreclosed Petitioners' rights. This is simply not the fact. Petitioners failed to use their right of appeal clearly afforded by Illinois procedures and the doctrine of laches long established under Illinois law was consistently applied.

CONCLUSION

It is respectfully urged that the Petition for Writ of Certiorari in this case be denied. The Petitioners failed to use their clear right of appeal. The Petitioners were properly found guilty of laches under long standing Illinois cases on the basis of particular facts of this case. The existence of this large school district should be confirmed, any other result causing great detriment and harm to the public interest.

The Petition before this Court presents no proper grounds for review on certiorari.

Respectfully submitted,

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